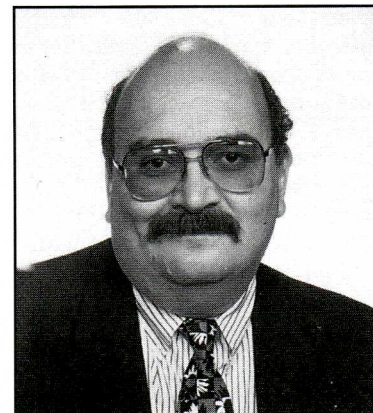


PARTNERSHIP: BRINGING TOGETHER TRIBAL AND STATE COURT JURISDICTIONS

by Hon. William Thorne



On the surface it would seem a simple proposition to bring together Tribal and State court jurisdictions. On closer examination, however, it appears to have been successfully accomplished only with careful planning and coordination. Unfortunately, it has not been as simple as calling a meeting and then having everyone in one room sit down and talk to each other. The purpose of this article to highlight successful strategies and erect warnings around the buried hazards.

The history of relations between tribes and states is strewn with checkbooks emptied to pay the army of litigators employed to battle each other. Virtually every possible dispute that can arise between governmental entities has arisen, and in some instances has become commonplace, in the history of tribal and state relations. In the era of shrinking budgets, and money from Washington drying up for both sides of these battles, it may be time to place a small portion of the war chest aside for attempts to create state and tribal alliances. Indeed, this may be the time when the window of opportunity has opened to let in a breath of clean refreshing air. It is time for traditional enemies to find that although there are still substantial differences, and a profound lack of trust, there are also areas of mutual interest and common concern. Each belligerent needs desperately to reprogram funds away from fighting toward meeting the needs of their citizens in this time when federal dollars are becoming increasingly rare. In addition, there are now federal statutes requiring that the disputing jurisdictions deal with each other

as equals. This may be the time to make one more attempt at building bridges and then partnerships.

Twenty years ago it would have been highly unusual for state and tribal courts to get together for joint problem solving. In fact, to the extent that they even thought of each other at all, it appears that they viewed each other as a significant source of problems. Despite this, tribal and state courts have, over the last couple of years, begun to talk to each other.¹ The many successes, as well as the occasional failure, have mapped the preferred routes out of the mine fields. Today, with the right planning, cease-fires may be put into place and alliances created.

There are several components common to a successful forum project. These include: 1) a group of "problem solvers" 2) gathered equally from both tribal and state courts 3) with an agenda focused on finding areas of mutual concern or shared interest 4) willing to explore, not just the way things have always been, but new ways of improving the working relationship between courts, even within their own systems.

Problem Solvers

Tribal-state projects will not succeed if the process is one of simply finger-pointing and blaming someone else for whatever problems are identified. Instead, the approach must be one of attempt to circumnavigate the obstacles, to seek cooperative ventures. Not everything needs to be solved definitively. Sometimes it is best to leapfrog the barriers that others have set up and continue to the goal. When viewing the differences between tribal and state courts, the gulf may ap-

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¹ Due in no small part to the forum project sponsored by the Conference of Chief Justices, the National Center for State Courts, the American Bar Association, and the National American Indian Court Judge's Association. Two national conferences were held, a 1991 conference in Seattle "Civil Jurisdiction of Tribal and State Courts: From Conflict to Common Ground" and a subsequent 1993 session in Santa Fe "Building on Common Ground: A Leadership Conference To Develop A National Agenda To Reduce Jurisdictional Disputes Between Tribal, State, and Federal Courts."

pear insurmountable. Much like the starving man who is overwhelmed at the prospect of making a meal of an elephant, the solution is one bite at a time. It is not necessary to create a comprehensive and universal solution to the problems that are created from parallel systems not working well together. Rather, the short term goal should be to create an ever expanding series of small agreements.

Policy decisions are generally beyond the realm of courts and court systems. The policy differences between tribal governments and state governments, including the sub-systems of county and other local governments, need not separate parallel court systems. Instead, if the focus is on working jointly to solve problems faced by both systems, they can become allies and not adversaries. Creative solutions to concrete difficulties need not involve inherent policy issues. Each has much to learn from the other. There is still more that can be created with the wisdom and experience of each being jointly applied to a problem.² If it is taken as a given, that the parallel system exists for similar reasons as our own, then there is someone available to share the burden (or, at least, commiserate).

Equal Representation In Forum

Of the initial attempts to create forums for state and tribal courts to discuss experiences, exchange information, and generate cooperative plans, the most successful have begun with equal representation from state and tribal court systems. The balance is important to ensure that the forum is not perceived as the property of either system, where the other is the guest. Instead, it is viewed as a setting to share, learn, and explore in a safe environment.³ The forum project that failed had minimal tribal representation.

Areas of Mutual Concern or Shared Interest

The sole forum project that went awry concluded that there were too many jurisdictional and other problems surrounding tribal courts and their relations with state courts for the participants to come to

mutually acceptable solutions. The particular project compiled a litany of problems. Litigation to resolve the issues was viewed as the only conceivable means to resolve the differences. The participants in that project concluded that their forum project was not an useful experience.⁴

In the jurisdictions that succeeded, the projects have focused upon identifying areas of commonality, not differences. In one state, North Dakota, this has meant focusing upon traffic as a common concern in a statewide meeting sponsored by their state supreme court. Their attempts at working together focused upon mutual enforcement of traffic regulation and sharing of traffic records targeted at reducing the loss of life and injuries that resulted from a lack of coordination in

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traffic enforcement. From this innocuous beginning, the various tribal and state courts are exploring larger issues.

In other states they chose not to limit themselves to one subject matter, but instead sought areas of agreement wherever they could find them. Washington's and Arizona's forum projects quickly identified training as one area of shared concern. The forum members concluded that lack of knowledge or contact between the two systems was a root cause of mistrust. Each state issued invitations to tribal court personnel to attend statewide training. In one instance the state authorized payment of per diem expenses for tribal judges attending. Two goals were met by encouraging attendance at the same training sessions. First, the joint training raised the professional training and standards for both court s personnel and second, it initiated an informal net-

work of contacts between judges from the two systems.⁵

The key portion of an agenda is to focus on areas where cooperation can be achieved. This creates confidence and trust that will smooth the road where genuine disagreements are encountered. Without the backdrop of cooperative working relationships, it is too easy for the separate systems to walk away from the other, shaking their heads over the lack of understanding or perception in the other. The project that failed, by contrast, concentrated on problems and not areas of mutual concern. Cooperative relationships can create a setting where disagreements are simply that, disagreements. Not indicators of some fatal flaw in the system, integrity or good will of the parallel court.

New Ways Of Working

One of the observations I have made over the last seventeen years of working as a tribal and state judge is that neither system has an exclusive franchise on the best way to do things. I have learned from an older tribal judge⁶ to deal with "people" who appear in court, not just the case; to treat each person with respect. I have learned as a state judge the advantage of working in a system where a significant number of the more vexing problems are no longer questions of first impression. In state courts some of the more basic questions have already been resolved. In addition, there are more resources to attempt creative approaches in state systems.

Historically, tribal communities have been committed to problem solving as well as concern for victims long before it has come into vogue in Anglo court systems. Over one hundred years ago the United States Congress determined that restitution and concern for victims was an improper consideration in criminal cases. With the passage of the Major Crimes Act⁷ tribes were bluntly told that the sole permissible concern in criminal matters was the defendant. Now, over one hundred years latter, Anglo courts and the community at large have reached the place in their civilization were concern for

² For example, the Navajo Supreme Court and the Judicial Council for the State of Utah have reached an agreement to augment the number of Navajo people serving on jury duty in San Juan County state courts. The agreement recognizes the sovereignty concerns of each as well as the interest of both in getting a representative jury panel into the courthouse.

³ If this reminds you of the environment for preschool or kindergarten, that may not be an inappropriate analogy. It is there that many of us learned to socialize and develop needed interpersonal skills. In this case it is the development of intercourt skills that needs to be developed.

⁴ This was also the same project that included less than equal tribal representation.

⁵ Some of the most profound learning experiences in judicial conferences comes from the after-hours discussions among colleagues sparked by the day's presentations. The same was true when tribal and state judges were presented with opportunities to learn about each other.

⁶ This judge did not have a high school diploma. He was appointed because of his common sense and fairness. I believe that the public at large would endorse those characteristics for their judges rather than one requiring simply advanced education.

⁷ 18 U.S.C. §1153.

victims is receiving more attention. Thirteen years ago I participated in a settlement program at a tribal court where a settlement judge (not the judge for the trial) met with the parties attempting to solve the problem by agreement. This was a mandatory process resulting in over 80% settlement. Within the last year a settlement process has been initiated in the state court system where I now work. In that process a settlement judge (not the trial judge) meets with the parties and attorneys attempting to resolve cases. The experiences of tribal courts can serve as teaching lessons for state courts, as well as vice versa. Each has much to learn from the other. And there is still more that can be created with the wisdom and experience of each being jointly applied to a problem.⁸

States have had a couple of hundred years experience running both urban and rural court systems. They have dealt with issues surrounding conflict of interest,⁹ ethical requirements for judicial personnel and the role of courts within the scheme of a democratic government.¹⁰ Tribal courts need not independently rediscover all the basic notions of fair dealing with it's citizenry. In addition, there have been developments in tort law, constitutional law, and jury practices that may be instructional to tribal court systems.

A word of caution is in order here. Too often the goal of efforts to enhance tribal courts, from the perspective of outsiders, is to re-create tribal courts in the image and likeness of state and federal courts. Unfortunately it is often overlooked or ignored that tribal courts are not intended to be pale imitations of state courts. Rather, the goal sparking the development of tribal courts has been the desire to create courts that properly reflect the values and concerns of the local community. A blending of the experience and worldview of each might create new and even better ways of resolving disputes for our communities.¹¹

Sharing The Burden

Tribal and state courts have more in common than they have differences. Each

is seeking to meet the expectations of a community. Each battles a shortage of resources. Each is held responsible for a perceived inability to deal with increasing crime and other social ills. Each is charged with being the sometimes unwilling counterweight to legislative and executive actions. The role and goal of each are similar, the methods, however, may differ in implementation.

Tribal courts are in particular need right now. While many state budgets are being restricted, the BIA budget for tribal courts is disappearing. Money is being funneled away from supporting tribal courts into other areas of need. Tribes are not in a position to adequately fund their court systems.¹² One option that tribal courts must look at seriously is the opportunity to begin sharing resources with local state courts.

Tribal and state courts have similar needs to access substance abuse programs, probations services, adult education programs, and mental health agencies. Likewise they will each encounter and be responsible for clients that live within the other's jurisdiction. Not to share supervision and treatment of clients would be both wasteful and unnecessarily frustrating. It is difficult enough to hold probationers accountable in normal settings, even more so when given the opportunity to play one jurisdiction against the other.¹³

In addition, cooperation is now mandated pursuant to the Violence Against Women Act recently passed by Congress.¹⁴ Pursuant to VAWA full faith and credit must be accorded protective orders from other jurisdictions, including those from tribal courts. In order to comply with the requirements of VAWA, tribal and state courts will have to develop cooperative working relationships. For example, criminal enforcement of protective provisions will not be simple in situations where the violator may not be subject to the criminal jurisdiction of the local court.¹⁵ To adequately protect victims, it will be necessary to funnel violations to the court having the appropriate jurisdiction.

State and tribal judicial systems have a great deal of experience to share. In addition, a coordinated effort to share resources and training would significantly reduce the drain on tribal court budgets that are already seriously in danger of collapse in some locations.¹⁶ Tribal court budgets are inadequate to pay staff at a professional level or provide even minimal levels of support.

It is time for the hostility that so often marked the exchanges between tribes and states to be replaced by genuine cooperation. It is time to conserve and share resources, rather than fund pointless legal struggles. It is time to be a good neighbor!

TOPICS FOR STATE AND TRIBAL COOPERATIVE VENTURES

Below are a list of possible areas of cooperation that can be undertaken to initiate the cooperative venture of state and tribal courts. This list is not all inclusive, nor a guarantee of success, but simply an effort to outline avenues of approach that may be successful.

Indian representation on state jury venires.

Virtually everyone agrees that juries ought to reflect the composition of the local communities. Too often tribal members are left out by the process undertaken to summons jurors. With some effort the problem can be addressed. Utah and the Navajo Nation are currently implementing an agreement to begin to remedy the problem by utilizing a tribal list of voters and cooperation between tribal and state courts to issue jury summons in the name of the tribal court to Navajos for jury service in state court proceedings.

Mutual recognition of domestic violence protective orders.

The recently adopted Violence Against Women Act requires that protective orders issued in one jurisdiction be fully enforced in other jurisdictions. This Act

⁸ See *supra* text accompanying note 2.

⁹ Not always successfully, but at least there are rules in place.

¹⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).

¹¹ For example, the Navajo Peacemaker system is being studied by various non-Indian courts as an alternative to "traditional" adversarial conflict.

¹² Adequately, being defined as a level approaching the per capita expenditure of states for their court systems.

¹³ Not unlike children playing one parent against the other when the parents fail to communicate well with each other.

¹⁴ Pub. L. 103-322, 108 Stat. 1902-1955 (1994).

¹⁵ Pursuant to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 55 L. Ed. 2d 209, 98 S. Ct. 1011 (1978) tribal courts lack criminal jurisdiction over non-Indians. Similarly, states lack criminal jurisdiction over Indians within reservation boundaries, absent consent of Congress.

¹⁶ In the past couple of years, I have learned that an associate trial judge, with a great deal of experience in tribal court, left to take a job as a substance abuse counselor because it paid so much more.



specifically includes tribal courts in the requirement for Full Faith & Credit of protective orders. Because Tribal Courts do not have criminal jurisdiction over non-Indians, coordination with local state courts is essential to protect victims.

Assessment of child support and facilitation of collection efforts.

All responsible people agree that children ought to be supported by their parents. Problems sometimes arise, however, when child support awards are based on formulas applicable to a state at large. Tribal economic situations can be vastly different from even those of surrounding non-Indian communities. Culturally acceptable methods of meeting that support requirement may also differ. An effort to arrive at appropriate support levels and methods can be a part of an overall effort to more effectively collect child support.

Access to / sharing of criminal histories.

Currently, criminal histories (also known as rap sheets) from state jurisdictions are not generally available to tribal courts, and vice versa. Most people working within court systems recognize that it is important for sentencing purposes for judges to have prior criminal histories. However, state and tribal judges are almost always ignorant of prior proceedings held in the parallel system. State law often restricts access to data banks of criminal histories and tribal courts may be hesitant to release records that may be used for enhancement purposes in state courts.¹⁷ Discussions can help resolve some of the conflicting concerns and create avenues of access to helpful information from the parallel system.

Recognition of parallel judgements.

Some states currently accord Full Faith & Credit to all tribal court orders and decisions. Others utilize the concept of comity. Still others fail to recognize tribal court orders at all. There are also tribes where state decisions are not given their due. It is to everyone's advantage to resolve these issues.

Certification of membership questions for ICWA matters.

One of the perplexing questions presented to state courts in Indian Child Welfare Act¹⁸ matters is the question of tribal membership. The Navajo Supreme Court, by rule, permits any court (including state trial courts) to certify questions of Navajo law for decision by the Navajo Supreme Court. Full utilization of this service would help resolve ICWA and other questions of tribal law faced by state courts. Other tribal courts ought to consider whether a similar approach would also serve their own communities interests.

Sharing of training resources.

The Bureau of Indian Affairs has drastically curtailed national training money for tribal courts.¹⁹ Tribes often do not have the resources or expertise to create an in-house training program to address CLE and staff training needs. States generally do an excellent job of creating in-house training either as a supplement or a replacement to national training programs. With the program already in place, the incremental costs of including tribal court personnel in such programs is relatively low. Some states have already issued invitations to tribal courts to attend state training; at least one state has even offered to fund the attendance of tribal people at the training sessions. In this time of diminishing resources, it is necessary to share whatever resource is available.

Inter-jurisdiction management of probationers/parolees.

Given the mobility of people in this country today, it is not unusual to have probationers/parolees cross jurisdictional lines for work, family concerns, or to relocate permanently. When predictable, it is certainly easier to have such clients check in with the local probation department, whether tribal or state. Each system has an interest in tracking offenders.

Sharing of treatment resources for criminal cases.

Services dependant upon federal dollars are in jeopardy today, if they have survived this long. Substance abuse treatment, education and job training programs, domestic violence treatment, parenting classes, etc. are all needed in each system. To the extent that the

services would simply be duplications, sharing of access ought to be the standard approach. Where special programs are developed that may have unique tribal/cultural focus or methodology, these programs ought to be made available to state judges who are attempting to resolve cases with Indian parties.

Facilitation of restitution assessment and collection.

People ought to be held accountable for their conduct, including the repayment of losses caused by their actions. Agreements between parallel systems would help assess the appropriate restitution and facilitate repayment to victims.

Community service in lieu of fines for work in other jurisdiction.

There is no reason that community service, properly verified, that is performed in one jurisdiction could not be counted to clear an obligation in a parallel jurisdiction.

Conclusion

These are only some of the possible areas that initial collaborative efforts can find fertile for cooperation. The good will derived from successes in these areas can help the parallel systems to trust their colleagues from another system when the more intractable problems are confronted.

Today, most people recognize that both state and tribal courts are an inevitable presence in or around Indian country. The suspicions, hostilities and jealousies of the past must be replaced by a cooperative working relationship. There is simply too much at stake. Nor are there enough resources available to waste some on unnecessary fighting or duplication. In a time when everyone must do more with less, sharing and cooperation is the only reasonable response to the presence of a parallel system. The responsibility of court systems to the public, both tribal and state, is to fairly and efficiently resolve disputes and dispense tempered justice. Neither system is the exclusive repository of justice or knowledge. Each can learn from the other. Each can share whatever is working well. Each can cooperate to find new and better approaches to common problems. The era of hostility and ignorance must give way to a time of partnership. To do less would be to abandon our duty to our communities.

¹⁷ Utah and Navajo have undertaken discussions to allow release of non-certified tribal convictions that may be utilized for sentencing purposes, but that would not qualify as an enhanceable offense (to which the tribe is opposed).

¹⁸ 25 U.S.C. §§ 1901-63.

¹⁹ The Indian Tribal Justice Act (Pub. L. 103-176) was signed into law on December 3, 1993. It promised \$58.4 million per year in federal funding for the operation and enhancements of tribal courts instead of the approximately \$12-\$14 million per year currently funded. However, the Bureau of Indian Affairs (BIA) continues to block implementation of the Act. No funds have been appropriated under the Act.